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Toward a Probable Cause Standard in Sentencing: Nickens v. State

TOWARD A PROBABLE CAUSE STANDARD IN SENTENCING: *NICKENS V. STATE*[1]

INTRODUCTION

The sentencing process has recently provoked increased interest in the legal community.[2] This development is no doubt the result of an awareness that, because most defendants plead guilty,[3] the critical stage in the criminal process is most often sentencing. Although the due process revolution has resulted in significant procedural safeguards for criminal defendants,[4] the sentencing decision has been left to the almost unfettered discretion of trial judges.[5] Indeed, one commentator has charged that sentencing is an area of "lawlessness."[6] It has been recognized, however, that due process applies at sentencing,[7] but, unfortunately, the question of what process is due has been largely unanswered.[8]

The primary value underlying the concept of due process of law is the notion that a person faced with adverse governmental action must be treated fairly.[9] A fundamental requirement of

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1. 17 Md. App. 284, 301 A.2d 49 (1973).

2. *See, e.g.*, ABA STANDARDS, APPELLATE REVIEW OF SENTENCES (Approved Draft, 1968); ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURE (Approved Draft, 1968); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25 (1970); Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51 (1972).

3. The guilty-plea rate varies, depending on jurisdiction, from seventy to ninety per cent. ABA STANDARDS, APPELLATE REVIEW OF SENTENCES 1 (Approved Draft, 1968).

4. For a brief chronicle of this revolution, *see* Canudo, *Crime and the Constitution: Have We Reached the Turning Point?*, 38 BROOKLYN L. REV. 629 (1972). *See also* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970).

5. "There is no other area of law, except perhaps the civil commitment of the mentally ill, where the lives of so many people are so drastically affected by officials who exercise a virtually absolute, unreviewed discretion." Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1 (1968), commenting on the probation and sentencing processes.

6. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

7. *See* Williams v. New York, 337 U.S. 241 (1949).

8. *Cf.* Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25 (1970); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

9. With respect to the requirements of due process in the determination of guilt, it has been said that the reviewing court must ascertain whether the proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Malinski v. New York, 324 U.S. 401, 417 (1954) (Frankfurter, J., concurring). It seems that, at the very least, this statement should apply as well to the sentencing process.

fairness in the sentencing context is that the sentencing decision must be based on accurate information.[10] Therefore, procedures must be developed to insure that sentencing judges do not abuse their discretion by using inaccurate information in making their decisions.

This note will examine the *Nickens* decision, which, although technically involving a narrow question of statutory construction, may represent a step towards solving the problem of establishing an accurate factual basis for the sentencing decision.[11] An examination of both federal and Maryland precedent will reveal that the *Nickens* holding is consistent with and, perhaps, compelled by the dictates of due process. In addition, because the *Nickens* holding requires that hearsay offered at sentencing must pass a reliability test similar to the test utilized when search warrant applications rest on hearsay information, the leading Supreme Court cases enunciating that test will be discussed. Finally, the discussion will focus on the question of whether the application of this search and seizure concept is appropriate in the sentencing context.

The Nickens Decision

William Rhodes was convicted of possession of heroin with intent to distribute, possession of controlled paraphernalia, maintaining a dwelling house as a common nuisance, and maintaining an automobile as a common nuisance.[12] At the presentence hearing,[13] the arresting officer testified that Rhodes was the number two man in a narcotics organization spanning the city of Balti-

10. As will be discussed *infra* at notes 29-67 and accompanying text, this proposition finds ample support in the case law. In addition, the proposition seems self-evident: A sentence—just as a conviction—based on inaccurate facts seems grossly unfair.

11. The implications, discussed *infra* at notes 29-50 and accompanying text, derive from the court's indication that due process considerations were involved in its decision. However, because the *Nickens* case could have been decided on purely statutory grounds and because the court did not explain why due process considerations were involved, *Nickens* could be narrowly interpreted in the future.

12. The conviction and sentence of co-appellant Nickens was affirmed. 17 Md. App. at 285, 301 A.2d at 53.

Rhodes' nuisance convictions were reversed because the State had failed to produce evidence demonstrating the recurring nature of the offenses. See Skinner v. State, 16 Md. App. 166, 293 A.2d 828 (1972) (evidence that illegal drugs found on the day appellant's automobile was searched held insufficient to support conviction for maintaining a common nuisance).

13. One writer has argued that there is a constitutional right to a sentencing hearing. Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1 (1968). However, the Supreme Court has not yet expressly held that such a right exists.

more and that he was a "bundle drop-off man"[14] who made daily deliveries to dealers. The officer said he had acquired this information from his personal investigation, enhanced by his "street knowledge,"[15] and from numerous informants whose identity he failed to disclose. He admitted that the reliability of some of the informants had not been established, but he insisted that he knew that the others were reliable. On cross-examination, he testified that he had followed Rhodes but had never seen him "drop bundles." Moreover, the only time he had seen Rhodes with contraband had been at the time of the search of Rhodes' home and automobile. Thus, the basis of the officer's allegations rested on the information from his informants. The trial judge denied Rhodes' motion to strike the testimony and set sentence at fifteen years of imprisonment without indicating whether he had relied on the officer's testimony in reaching this disposition.

On appeal Rhodes argued that the testimony was inadmissible under section 298(f) of the Uniform Controlled Dangerous Substances Act.[16] This section provides, in part, that hearsay is admissible in the sentencing of drug offenders "if the underlying circumstances upon which it is based and the reliability of the source of the information is demonstrated."[17] Appellant contended that the close approximation of this statutory language to the language contained in *Spinelli v. United States*[18] indicates that hearsay must be scrutinized under standards identical to those required in the search warrant situation.[19] Arguing that the

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In Maryland, there is no statutory right to a hearing. However, the case of Driver v. State, 201 Md. 25, 92 A.2d 570 (1952), established the right of an offender to refute adverse information. To this extent, then, Maryland recognizes the right to a hearing.

14. A "bundle drop-off man" is a drug pusher who delivers packages containing twenty-five "bags," or single doses, to street-level heroin pushers. Telephone interview with Thomas J. Bollinger, Assistant State's Attorney for the City of Baltimore and Director of the Narcotics Strike Force, in Baltimore, Nov. 27, 1973.

15. 17 Md. App. at 288-89, 301 A.2d at 51.

16. The Act is codified at MD. ANN. CODE art. 27, §§ 276-302 (1971).

17. Section 298(f) reads as follows:

> Notwithstanding any provision of law to the contrary, at any hearing relating to bail or sentencing arising out of any violation or alleged violation of any provision of this subheading, hearsay evidence shall be admissible if relevant to the issue and *if the underlying circumstances upon which it is based and the reliability of the source of the information is demonstrated.*

MD. ANN. CODE art. 27, § 298(f) (1971) (emphasis added).

18. 393 U.S. 410 (1969).

19. Brief for Appellants at 7, Nickens v. State, 17 Md. App. 284, 301 A.2d 49 (1973). Although the brief did not refer to *Spinelli* by name, the citation of Dawson v. State, 14 Md. App. 18, 24, 284 A.2d 861, 864 (1971) (Moylan, J., concurring), the leading Maryland interpretation of *Spinelli*, makes it clear that the appellants were urging the *Spinelli* standards.

legislature had intended to relax evidentiary standards in the sentencing of drug offenders, the State asserted that there had been substantial compliance with the statute.[20]

Finding that section 298(f) "mandates the constitutional protections" of the due process clause,[21] and vacating the sentence, the Maryland Court of Special Appeals held that the reliability requirements of the statute had not been met and that, if the trial judge had considered this testimony in making his decision, appellant had been denied due process. The court therefore remanded the case to the trial court for resentencing.

The court's holding required that, to meet the statutory requirements on remand, the testimony must pass a two-pronged test consisting of a showing of informational reliability and source credibility. Under this test, the mere conclusions of the witness are insufficient; the statements made by the witness's informants must be recited in order that the judge may determine if the underlying circumstances demonstrate informational reliability. Further, the witness must state facts which demonstrate his informant's credibility. The court indicated, however, that the credibility requirement is not necessarily as strict as that set forth in *Spinelli*.[22] Thus, although the court adopted a test with an analytical framework identical to *Spinelli*, it apparently believed that the application of that test should be somewhat different in the sentencing context.

Use of Hearsay Before Nickens *and Section 298(f)*

In passing on the admissibility of the officer's testimony in the instant case, the court did not refer to prior Maryland cases but, instead, merely scrutinized the testimony according to the

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20. Brief for Appellee at 7.

21. "It was not the intention of the Legislature to allow the sentencing judge to consider all information . . . without regard to the source or trustworthiness of hearsay presented. The enactment [section 298(f)] mandates the constitutional protections . . . ." 17 Md. App. at 289, 301 A.2d at 52. It is from this statement that the implications of the *Nickens* case, discussed *infra* at notes 29-67 and accompanying text, are derived. Because the court did not explain why due process was involved here and because the case could have been decided on purely statutory grounds, future cases might treat this statement as pure dictum and thus deprive *Nickens* of a more expansive interpretation. However, as will be discussed *infra* at notes 36-67 and accompanying text, an examination of prior federal and Maryland case law will reveal that the *Nickens* court was on solid ground in making this comment.

22. "This is not to say that the credibility requirements are necessarily as restrictive as those required to establish probable cause in an ex parte proceeding. *Spinelli v. United States*, 393 U.S. 410." 17 Md. App. at 290, 301 A.2d at 52 (footnote omitted).

statutory standards. Thus the question arises: Did section 298(f) change Maryland law?

At first blush the enactment seems to be a codification of the case law which authorizes the use of hearsay at sentencing. The Maryland Court of Appeals sanctioned the use of hearsay in *Costello v. State*,[23] where the appellant challenged the trial judge's use of unfavorable information regarding his marital life. The wife had testified both prior to and after the reception of this information that the appellant had been a good husband. The court held that there had been no violation of appellant's due process rights because the wife's testimony had given appellant the opportunity to rebut the information. Although the dissenting judge acknowledged that the information was hearsay, he dissented on other grounds. Thus, the court of appeals tacitly approved of the use of hearsay at sentencing.

Subsequently, in *Scott v. State*,[24] the court was more explicit in its approval of the use of hearsay. Scott was a probationer who had been charged with assault and assault with intent to rape. At the trial a police officer testified that he had retrieved a cap dropped by the fleeing assailant at the scene of the crime and that Scott's mother had identified it as belonging to her son. After this testimony was excluded as hearsay, the mother denied that the cap belonged to Scott. Although Scott was acquitted of the charges, the trial judge nonetheless revoked his probation on the basis of the officer's testimony. The Court of Appeals affirmed. Pointing to the similarity between the sentencing process and the probation-revocation process, the court reasoned that, since hearsay may be used in determining sentence,[25] it may likewise be used in revoking probation.

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23. 237 Md. 464, 206 A.2d 812 (1965).

24. 238 Md. 265, 208 A.2d 575 (1965).

25. "In the determination of a proper sentence a judge may utilize information obtained outside the courtroom, information furnished by those not subject to cross-examination and sometimes hearsay . . . ." *Id.* at 275-76, 208 A.2d at 581, citing Costello v. State, 237 Md. 464, 206 A.2d 812 (1965) and Driver v. State, 201 Md. 25, 92 A.2d 570 (1952).

Neither *Costello* nor *Driver* expressly used the term "hearsay" in discussing the types of information the sentencing judge may use. As discussed at text accompanying note 23 *supra*, the *Costello* majority implicitly approved of the use of hearsay. However, the *Driver* case, discussed at text accompanying notes 56-60 *infra*, involved the use of a presentence report, which, although its use may contain hearsay dangers, has never been explicitly labeled "hearsay" in any Maryland cases. In any event, because *Driver* involved the use of a presentence report, the statement in *Driver* that "the judge may consider information . . . from persons whom the defendant has not been permitted to confront or cross-examine," 201 Md. at 32, 92 A.2d at 573-74, need not be construed as approving of the

In *Skinker v. State*[26] the Court of Appeals once again, in dictum, approved the use of hearsay at sentencing.[27] Thus, if section 298(f) were enacted in order to relax evidentiary standards in the sentencing of drug offenders, as the State in the *Nickens* case asserted, the statute was unnecessary.[28] Indeed, the insertion of the reliability language in the statute may have tightened the standards, because prior Maryland cases had not established any rule governing the admissibility of hearsay.

THE SENTENCING PROCESS

Two major implications based on the court's reference to due process[29] may be drawn from the *Nickens* decision. The first is obvious: If the court's holding were compelled not only by the statutory language but, in addition, by the dictates of due process, then the reliability test should be applicable to the sentencing of all offenders, not simply to that of drug pushers.

A second implication is that information contained in the presentence report must not be considered unless the report con-

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general use of hearsay at sentencing. Additionally, the *Scott* court's use of the conjunctive in the passage quoted above suggests that the *Costello* case was the authority for the "and sometimes hearsay" portion of the passage: The court apparently drew a distinction between "information obtained outside the courtroom, . . . furnished by those not subject to cross-examination"—which, incidentally, looks suspiciously similar to the definition of hearsay, see MCCORMACK, HANDBOOK ON THE LAW OF EVIDENCE § 246 (1972)—and "hearsay". Therefore, the *Costello* case, because hearsay was in fact involved, would have been the appropriate authority to cite.

26. 239 Md. 234, 237, 210 A.2d 716, 717-18 (1965). Skinker had been indicted for forging and uttering with intent to defraud. He had originally pleaded guilty, but the plea was subsequently withdrawn. Later, Skinker's counsel filed a motion for a grant of probation without verdict, see MD. ANN. CODE art. 27, § 641 (1971), which motion was granted. However, on the basis of information that Skinker had deserted from the Marine Corps, stolen a tire, and carried a concealed weapon at the time of the theft, the trial judge revoked his probation and imposed an indeterminate sentence not to exceed four years.

On appeal, Skinker contended that probation was improperly revoked because his alleged behavior did not violate the terms of his probation—it occurred in D.C., not Maryland. In addition, Skinker argued that the original grant of probation without verdict was invalid because improper procedures had been followed. The Court of Appeals noted that, in determining Skinker's punishment, the trial judge could properly have considered information, including hearsay, which would have been inadmissible at a trial. However, the court held that the revocation and subsequent imposition of sentence were invalid because Skinker had not given written consent, required by section 641, to being given probation without verdict in the first instance.

27. In Haynes v. State, 19 Md. App. 428, 438, 311 A.2d 822, 828 (1973), decided subsequent to *Nickens*, the court held, on the basis of case law, that hearsay may be used at sentencing.

28. The Uniform Controlled Dangerous Substances Act, of which section 298(f) is a part, was enacted in 1970, subsequent to the decisions in the cases discussed at text accompanying notes 23-26 *supra*. See ch. 403, [1970] Md. Laws 881.

29. See note 21 *supra* and accompanying text.

tains facts supportive of those conclusions.[30] This implication, less obvious than the first, derives from the following reasoning: The court's comment regarding due process may have been based on an awareness that the practice of receiving conclusory information from a source which cannot be cross-examined is fraught with the danger of inaccuracy.[31] Without the weapon of cross-examination, defense counsel cannot test the adequacy of the factual basis for the source's conclusions nor can he expose the source's bias or dishonesty. A presentence report, of course, cannot be cross-examined. Although the preparers of the report may be presumed to be honest,[32] there is, nevertheless, a danger that the conclusions contained in the report lack an adequate informational basis.[33] It follows, therefore, that the report should contain the underlying facts from which the conclusions are drawn.[34]

Although the *Nickens* court did not explain the rationale for its statement that section 298(f) "mandates the constitutional protections" of the due process clause,[35] an examination of federal and Maryland precedent will reveal that the *Nickens* holding was, at least arguably, compelled by the requirements of due process.

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30. This conclusion was reached, on constitutional grounds, in United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). The *Weston* case and its relationship to *Nickens* is discussed at text accompanying notes 36-50 *infra*.

31. See discussion at notes 43-50 and accompanying text.

32. It has been suggested, however, that the preparers of the report are not free of bias: "Naturally, individual probation officers vary in their willingness and ability to make recommendations objectively. Consequently, the presentence report may be more than unfavorable to a defendant; it may actually be prejudicial to him . . . ." Steele, *Counsel Can Count in Federal Sentencing*, 56 A.B.A.J. 37, 38 (1970).

33. *Cf.* United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), discussed at text accompanying notes 44-50 *infra*.

34. Moreover, because the sentencing judge must draw the factual conclusions on which his decision is based, it would seem improper for the judge blithely to accept the report's conclusions without attempting to ferret out the factual basis therefor. *But cf.* Haynes v. State, 19 Md. App. 428, 311 A.2d 822 (1973), decided subsequent to *Nickens*.

The appellant in *Haynes* challenged the trial judge's use of a presentence report which, in addition to other adverse information, characterized Haynes as a "street person" who was "the leader of a group composed of individuals with bad reputations and criminal records." *Id.* at 435, 311 A.2d at 826. The objection to the report was not, however, framed in terms of the report's lack of corroborative data. The objection was that the report "was based in large part upon rumor and hearsay." *Id.* at 430, 311 A.2d at 824. The court decided that the information was not rumor and held that, since hearsay may be used in sentencing, there had been no improper use of the report. The court did not indicate whether the report contained corroborative information, but it did note the trial judge's statement that the report was " 'one of the best presentence reports . . . I have ever had occasion to read. It is in great detail . . . .' " *Id.* at 435, 311 A.2d at 826-27.

35. *See* note 21 *supra*.

Federal Precedent

The federal cases clearly establish the principle that a sentence must not be based on inaccurate information, and one federal case has held that a sentence must not be based on information whose accuracy has not been adequately demonstrated.

The leading federal case involving the use of inaccurate information in determining sentence is *Townsend v. Burke*,[36] Townsend, while without counsel, had been sentenced on the basis of materially untrue information or the trial judge's own misreading of Townsend's record. The Supreme Court held that, because counsel could have prevented this result, the absence of counsel violated due process.[37] Further, the Court asserted that fair play

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36. 334 U.S. 736 (1948). After Townsend had pleaded guilty to robbery and burglary, the following colloquy between Townsend and the trial judge transpired:

'By the Court (addressing Townsend):

'Q. Townsend, how old are you?

'A. 29.

'Q. You have been here before, haven't you?

'A. Yes, sir.

'Q. *1933, larceny of automobile.* 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. *1938, entering to steal and larceny in Doylestown.* Were you tried up there? No, no. Arrested in Doylestown. That was up on Germantown Avenue, wasn't it? You robbed a paint store.

'A. No. That was my brother.

'Q. You were tried for it, weren't you?

'A. Yes, but I was not guilty.

'Q. And 1945, this. 1936, entering to steal and larceny, 1350 Ridge Avenue. Is that your brother, too?

'A. No.

'Q. *1937, receiving stolen goods, a saxophone.* What did you want with a saxophone? Didn't hope to play in the prison band then, did you?

'The Court: Ten to twenty in the Penitentiary.'

Id. at 739-40 (emphasis supplied by the Court).

The Court, unimpressed by the trial judge's wit, commented that his "facetiousness [cast] a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate." *Id.* at 740. In addition, the Court pointed out that Townsend had been acquitted of the charges made in 1933 and 1938. Thus, Townsend, while without counsel, "was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record." *Id.* This result, according to the Court, "is inconsistent with due process of law." *Id.* at 741.

37. There is no doubt that this is the correct reading of the narrow holding. *Townsend* was decided before the right to appointed counsel was applied to state criminal prosecutions. A defendant could, however, demonstrate that, because of the unique circumstances of his case, the denial of counsel violated due process. See Betts v. Brady, 316 U.S. 455 (1942). *See generally* Note, *The Indigent's Right to Counsel and the Rule of Prejudicial Error*, 97 U. PA. L. REV. 855 (1949). The *Townsend* Court's opinion clearly indicates that the narrow basis for its holding turned on the prejudicial effect of the absence of counsel. See discussion at note 36 *supra*.

requires that sentence should not be based on inaccurate information. Thus, *Townsend* may be viewed as establishing the principle that due process is denied when sentence is based on information that is inaccurate.

The reliability principle of *Townsend* was invoked in the recent case of *United States v. Tucker*.[38] Emphasizing the unreliability of convictions obtained in violation of *Gideon v. Wainwright*, the *Tucker* Court held that such convictions may not be considered in determining sentence: "As in *Townsend v. Burke*, . . . 'this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.' "[39]

In addition to the *Tucker* case, recent circuit court cases have recognized the *Townsend* reliability principle.[40] Thus, the proposition that a sentence based on inaccurate information cannot stand is well established. That this proposition is compelled by the notion of fundamental fairness is obvious. However, unless procedures are developed to insure the accuracy of sentencing information, unfairness may, nonetheless, be the result.

In *Williams v. New York*,[41] decided subsequent to *Townsend*,

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Subsequently, in Mempa v. Rhay, 389 U.S. 128 (1967), the Supreme Court held that the right to counsel applies to sentencing proceedings. See Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25, 30 & n.37 (1970); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 833-35 (1968). On the role of counsel in sentencing, see Feit, *"Before Sentence is Pronounced . . ." A Guide to Defense Counsel in the Exercise of his Postconviction Responsibilities*, 9 CRIM. L. BULL. 140 (1973); Steele, *Counsel Can Count in Federal Sentencing*, 56 A.B.A.J. 37 (1970).

38. 404 U.S. 443 (1971). Tucker, in 1953, had been found guilty of bank robbery. At the trial, the credibility of his testimony had been impeached by information that he had previously been convicted of three felonies. After the trial, the judge, giving "explicit attention to the three previous felony convictions," had sentenced Tucker to 25 years imprisonment. *Id.* at 444. Several years later, a California court held that two of the convictions had been obtained in violation of his right to counsel. The Court commented that, had the trial judge, in 1953, been aware of the constitutional infirmity of these convictions, "the factual circumstances of [Tucker's] background would have appeared in a dramatically different light." *Id.* at 448. The Court concluded that "[e]rosion of the *Gideon* principle can be prevented here only by . . . remanding this case to the trial court" for resentencing. *Id.* at 449.

The *Tucker* case is discussed in Note, *Defendant's Right to Protection from Prior Uncounselled Convictions*, 1973 WASH. L. Q. 197.

39. 404 U.S. at 447, citing Townsend v. Burke, 334 U.S. 736, 741 (1948).

40. *See* United States v. Powell, 487 F.2d 325, 328 (4th Cir. 1973); United States v. Metz, 470 F.2d 1140, 1142 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970). *See also* Towers v. Director, 16 Md. App. 678, 681, 299 A.2d 461, 464 (1973).

41. 337 U.S. 241 (1949).

the Supreme Court seriously limited the weapons available to offenders for disproving allegations made against them, and thus increased the danger of inaccuracy. In *Williams*, the Court upheld the imposition of the death penalty following a conviction for felony-murder. Despite the jury's recommendation for life imprisonment, the sentencing judge apparently believed that his decision was compelled by the adverse information contained in the presentence report. According to the report, Williams had previously committed thirty burglaries. The report said that he had confessed to some of these crimes and that witnesses had identified him as the perpetrator of the others. In addition, the report charged that Williams possessed a "morbid sexuality."[42] Williams contended that, because the information was derived from sources he had not had the opportunity to confront or to cross-examine, he had been denied due process by the judge's use of the information.

Justice Black, speaking for the majority, pointed out that Williams had neither challenged the accuracy of the allegations nor attempted to refute them. Further, he noted that Williams had been zealously represented by three lawyers. The Court then held that an offender is not denied due process when his sentence—even the death penalty—is based on information received from out-of-court sources that he has not had the opportunity to confront or to cross-examine.[43]

Without the right of cross-examination, offenders might find it difficult to disprove adverse information offered at sentencing. Thus, a person might be sentenced on the basis of inaccurate information, but, because he cannot disprove it, he will be denied relief.

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42. *Id.* at 244.

43. *Id.* at 251-52. The Court's rationale was apparently grounded on the view that requiring open court testimony with cross-examination would, perhaps, seriously limit the sentencing judge's ability to acquire complete information. Obtaining complete information, reasoned the Court, is necessary to enable judges to render sentencing decisions which fit individual offenders, rather than decisions based solely on the nature of the crime. Because the procedure of requiring open court testimony with cross-examination "could endlessly delay criminal administration in a retrial of collateral issues, the due process clause [should not be treated] as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence." *Id.* at 250-51.

The wisdom of this reasoning is questionable. As one commentator has said: "This [the *Williams* emphasis on preserving maximum discretion in the sentencing judge] is a prime example of the oft repeated error of confusing benevolent purpose with actual or potential arbitrary outcome." Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1, 15 (1968).

A recent federal case, *United States v. Weston*,[44] illustrates the danger of inaccuracy that results from the absence of the right of cross-examination. Relying primarily on information contained in the presentence report, the trial judge had sentenced Weston to twenty years imprisonment. The report charged that Weston, convicted for violating a federal drug statute,[45] was the largest heroin dealer in the western Washington state area. Weston,it elaborated, made bi-monthly trips to Arizona or Mexico, where she would purchase $60,000 worth of heroin, a quantity sufficient to yield a profit of $140,000. Weston vigorously denied this charge and her attorney observed that she had never displayed "any sign of wealth."[46] Weston could, nevertheless, offer no facts tending to disprove the allegations. Pointing to this deficiency as well as the reliability of the Bureau of Narcotics and Dangerous Drugs, which had supplied the information, the trial judge remarked that he had no alternative but to believe the report. However, he decided to direct the Government to present corroborative factual material to be viewed *in camera*.

Inspection of the material revealed that the allegations were based primarily on information from an informant who was said to be reliable. The information was that on one occasion a trip to Mexico was about to be made, but there was no contention that the trip actually was made. The informant had also said that Weston was distributing drugs to one Jackson for delivery to select customers. Finally, the report stated that the package of heroin seized from Weston was identical to packages of heroin and cocaine that were seized from Jackson. After the *in camera* inspection the judge refused to reduce the sentence.

On appeal, the Court of Appeals for the Ninth Circuit, basing its decision on the reliability principle of *Townsend*,[47] held that the judge may not consider information from the presentence report "unless it is amplified by information such as to be persuasive of the validity of the charge there made."[48] The information

44. 448 F.2d 626 (9th Cir. 1971), *cert. denied* 404 U.S. 1061 (1972), noted in 9 HOUS. L. REV. 560 (1972) and 50 N.C. L. REV. 925 (1972).

45. Weston was convicted for "receiving, concealing and facilitating the transportation of . . . heroin, knowing it had been imported contrary to law." 448 F.2d at 627. This statute was repealed by Act of Oct. 27, 1970, Pub. L. No. 91-513, title III, § 1101(a)(2), (4), 84 Stat. 1291. For statutory history, see 21 U.S.C. §§ 171-174 (1970).

46. 448 F.2d at 629.

47. "In Townsend v. Burke, . . . the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved." *Id.* at 634.

48. *Id.*

offered by the Government was held to be insufficient to corroborate the "broad charges"[49] contained in the report. In answer to the argument that the defendant had had a chance to refute the charges, the court pointed to the difficulty of "proving a negative"[50] and placed the burden on the Government to prove the affirmative.

The *Nickens* court did not cite *Weston*, but both cases apparently recognized the danger inherent in permitting the sentencing judge to receive conclusory information from a source which cannot be cross-examined. To reduce this danger, both courts required that such information must be supported by corroborative facts. Thus, both *Weston* and *Nickens* may be viewed as progeny of *Townsend*: While *Townsend* tells us that a sentence must not be based on information shown to be inaccurate, *Weston* and *Nickens* tell us that a sentence must not be based on information whose accuracy has not been sufficiently demonstrated.

Maryland Precedent

Prior Maryland sentencing cases emphasize the breadth of the trial judge's discretion in determining sentence[51] and indicate that his decision is not reviewable.[52] However, the cases do recognize an exception to the non-reviewability doctrine when objections to sentencing procedures are made on due process grounds.[53] The principal due process requirement is that offenders must be given the opportunity to refute adverse information.[54] Additionally, one line of cases indicates that it is also improper for the judge to consider certain information—referred to in one case as

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49. *Id.* at 630.

50. *Id.* at 634.

51. *See, e.g.*, Gee v. State, 2 Md. App. 61, 68, 233 A.2d 336, 339-40 (1967).

52. *See* Duker v. State, 162 Md. 546, 548, 160 A. 279, 280 (1932) (the reasoning of the trial judge is not reviewable). *But see* James v. State, 242 Md. 424, 430, 219 A.2d 17, 21 (1966) (sentence not reviewable unless motivated by passion, prejudice, ill-will, or other unworthy motive) (dictum). *James* may indicate that there is a limited exception to the doctrine that appellate courts will not review the substantive aspects of sentencing.

A similar exception has been recognized by some of the federal circuit courts. See Comment, *Present Limitations on Appellate Review of Sentencing—McGee v. United States*, 58 IOWA L. REV. 469, 476 (1972); Note, *Daniels v. United States: Appellate Review of Criminal Sentencing—Limiting the Scope of the Non-Review Doctrine*, 33 U. PITT. L. REV. 917 (1972).

Maryland law now provides that a defendant who has been sentenced to more than two years may have his sentence reviewed by a panel of three trial judges. MD. ANN. CODE art. 26, §§ 132-138 (1973).

53. *See, e.g.*, Turner v. State, 5 Md. App. 584, 593-94, 248 A.2d 801, 807 (1968). *See generally* Note, *Appellate Review of Sentencing Procedures*, 74 YALE L. J. 379 (1964).

54. *See* Driver v. State, 201 Md. 25, 92 A.2d 570 (1952), discussed *infra* at text accompanying notes 56-60.

"impermissible consideration[s]"[55]—despite the defendant's failure to disprove it.

The leading Maryland sentencing case is *Driver v. State*.[56] The appellant in *Driver* had been sentenced to death following convictions for sodomy and rape. The presentence report stated, *inter alia*, that there was a "rumor"[57] that Driver, a black man, had raped a white woman and had approached a white child. In discussing the trial judge's discretion, the Court of Appeals said that he may consider evidence concerning the defendant's "reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him"[58] but that information not received in the defendant's presence must be brought to his attention in order that he may have opportunity to refute it.[59] The death sentence was upheld because, although information based on rumor is not to be considered, the defendant did not object to the contents of the report, and therefore did not rebut the presumption that the trial judge has made proper use of the report.[60]

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55. Baker v. State, 3 Md. App. 251, 258, 238 A.2d 561, 566 (1968).

56. 201 Md. 25, 92 A.2d 570 (1952).

57. *Id.* at 31, 92 A.2d at 573.

58. *Id.* at 31-32, 92 A.2d at 573.

59. *Id.* at 32, 92 A.2d at 573. *But see* Scott v. State, 238 Md. 265, 275, 208 A.2d 575, 581 (1965), where the court stated that the trial judge may, at his discretion, refuse to reveal the contents of the presentence report. This raises the question, not explored here, of whether non-disclosure of the contents of the presentence report is a denial of due process. For a discussion of this issue, see Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25, 37-40 (1970); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 827-28, 835-41 (1968).

Maryland law now provides that the report "shall be made available" to defense counsel "upon request." MD. ANN. CODE art. 41, § 124(b) (Supp. 1973). In Haynes v. State, 19 Md. App. 428, 432, 311 A.2d 822, 824-25 (1973), this provision was interpreted to divest the trial judge of discretion to refuse disclosure.

60.

> We must assume that, in the absence of evidence to the contrary, the Court made proper use of the report and did not give consideration to anything based only upon rumor. Therefore, we find no basis for appellant's contention that he was deprived of due process of law.

201 Md. at 34, 92 A.2d at 574.

Both Costello v. State, 337 Md. 464, 471, 206 A.2d 812, 816 (1965), and Jordan v. State, 5 Md. App. 520, 528, 248 A.2d 410, 416 (1968), indicate that there is a presumption that the trial judge has made proper use of the report. This presumption was not mentioned in *Nickens*, but perhaps the presumption was rebutted by the trial judge's denial of appellant's motion to strike the officer's testimony: The *Driver* case implies that, had Driver objected to the report and failed to receive assurance from the judge that he would not consider the rumor, there would have been some basis for inferring that the judge had considered the rumor in determining Driver's sentence. Likewise, the trial judge's failure to grant Rhodes' motion to strike provides a basis for inferring that he had considered the officer's testimony in determining Rhodes' sentence. Thus, the *Nickens* court was not at liberty to assume that the testimony had not been considered.

Although the *Driver* case emphasized the trial judge's discretion, it did indicate that a defendant must be given the opportunity to disprove adverse information. In addition, the case implied that mere rumor is an impermissible consideration, even though the defendant has been unable to disprove it.

Another impermissible consideration in sentencing, according to dictum in *Walker v. State*,[61] is an acquittal from a previous charge. The *Walker* dictum was reiterated in *Purnell v. State*;[62] the court explained that the rationale for this rule is that prior acquittals demonstrate that the charges were not well founded. However, the scope of this exception to the judge's discretion is limited. The court in *Purnell* upheld as proper the judge's consideration of the police officers' testimony that the defendant had admitted to stealing a car and attempting to break into a store, although no charges had been made.

The Maryland Court of Special Appeals in *Baker v. State*[63] interpreted *Purnell* to mean that a judge should not consider evidence of prior crimes if there have been no convictions nor admissions by the defendant. The appellant in *Baker* had been convicted of committing a burglary. At the trial an investigating officer had testified that similar burglaries had occurred in the same area at about the same time. Reading this testimony "between the lines,"[64] the trial judge decided that Baker had com-

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61. 186 Md. 440, 443, 47 A.2d 47, 48 (1946). After Walker had been convicted of attempted rape, the trial judge commented that he recognized Walker and Walker's brother because " '[t]hey were here in court before me so little time ago,' " but that he had only a " 'vague recollection' " of the incident, which he thought involved a pistol, and could not remember who had been charged. *Id.* at 442, 47 A.2d at 48. The prosecutor remarked: " 'I don't know whether your Honor should know about that.' " *Id.* at 443, 47 A.2d at 48. The trial judge agreed but then indicated that he " 'remember[ed] pretty much about it.' " *Id.* Subsequently, the judge imposed the death penalty, despite the recommendation of two medical experts that Walker should be given life imprisonment.

The Court of Appeals, although noting that "a trial court should not consider mere charges of which a traverser [had been] acquitted," found that the trial judge had not done so in the instant case:

> [T]he mere fact that a trial court may have had some previous acquaintance with a traverser, in the course of his judicial duties, would not disqualify him from hearing a subsequent case. In the instant case, it seems clear that the court did not recall whether the traverser or his brother had been charged with a previous offense, the nature of the offense, or the outcome . . . . We find nothing . . . to indicate any prejudice against the traverser on the part of the trial court, or that any undue weight was given to the previous court appearance of the traverser.

Id. In addition, the court found no error in the trial judge's refusal to follow the recommendations of the medical experts: "The responsibility for the selection of the penalty rests upon the trial court, not with the medical experts." *Id.* at 444-45, 47 A.2d at 49.

62. 241 Md. 582, 584, 217 A.2d 298, 299-300 (1966).

63. 3 Md. App. 251, 257, 238 A.2d 561, 566 (1968).

64. *Id.* at 256, 238 A.2d at 565.

mitted the other burglaries. The Court of Special Appeals, commenting that the sentence must be based on proper considerations, held that evidence of prior criminal conduct is not properly considered if there has been no charge, no conviction, and no admission.

The rationale of the *Baker* case was suggested by the Court of Special Appeals in *Bryson v. State*.[65] Bryson, who had pleaded guilty to grand larceny, challenged the trial judge's use of information that he had previously committed thirty-seven burglaries and larcenies. According to the prosecutor, Bryson had admitted these crimes. Bryson relied on *Baker* in arguing that it was not proper to consider such allegations without corroboration. The court felt constrained to distinguish *Baker* and did so on the ground that *Baker* involved a sentence based on the trial judge's speculation, whereas the judge in the instant case had sentenced on the basis of facts.[66] This result suggests that information apparently based on fact is not impermissible.

The rationale underlying the cases suggesting of the "impermissible considerations" approach seems to be that certain information is so inherently unreliable that it should not be considered in sentencing, despite the defendants inability to refute it. The *Nickens* decision may be brought into the "impermissible considerations" rubric by a reading of *Nickens* that mere conclusory hearsay may not be considered[67]—an interpretation similar to the *Driver* rule that mere rumor may not be considered. However, in adopting a *Spinelli*-like test for the admission of hearsay, the *Nickens* court went beyond prior cases, since, heretofore, no Maryland case had set forth a reliability test for sentencing information.

THE SPINELLI STANDARDS

The *Nickens* holding requires that the sentencing judge scru-

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65. 7 Md. App. 353, 255 A.2d 469 (1969).

66.

> In *Baker*, . . . the trial judge speculated that Baker had committed numerous other crimes for which he had not been caught, but that case can be distinguished in that the State's Attorney here was merely giving a recital of the facts and stated that the appellant also admitted that he had committed the other crimes.

Id. at 354, 255 A.2d at 470. The court did not make clear what other "facts" were being alluded to. Apparently, the court was referring to Bryson's alleged admission that he had committed the grand larceny, as well as the other crimes, in order to support his heroin addiction.

67. Indeed, the *Nickens* court referred to the officer's testimony as an "impermissible consideration." 17 Md. App. at 291, 301 A.2d at 53. Thus, although none of the "impermissible considerations" cases were cited in the opinion, the court apparently recognized those cases as being kindred.

tinize hearsay according to standards similar to those required for establishing probable cause that were set forth in *Aguilar v. Texas*[68] and further explicated in *Spinelli.*[69] Such similarity recommends an analysis of the *Aguilar-Spinelli* standards and the appropriateness of applying them in the sentencing context.

In *Aguilar*, the Court examined a conclusory affidavit, the salient part of which read as follows: " 'Affiants have received reliable information from a credible person and do believe that . . . narcotics . . . are being kept at the above described premises . . . .' "[70] The Court ruled the affidavit to be constitutionally defective because it did not contain supporting facts sufficient to allow the magistrate to make an independent determination of whether probable cause existed. The majority, speaking through Justice Goldberg, stated the rule as follows:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, . . . *the magistrate must be informed of some of the underlying circumstances from which the informant concluded* that the narcotics were where he claimed they were, *and some of the underlying circumstances from which the officer concluded that the informant*, whose identity need not be disclosed, . . . *was "credible" or his information "reliable."*[71]

The affidavit scrutinized in *Spinelli* stated that the FBI " 'has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WY 4-0136.' "[72] In addition to the informant's tip the affidavit contained information—which, the Government argued, corroborated the tip—regarding the FBI's investigation of Spinelli. He had been kept under surveillance for five days in August of 1965, and on four of those days he was seen crossing a bridge from Illinois to St. Louis, Missouri, and parking in the lot used by

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68. 378 U.S. 108 (1964).

69. The leading Maryland discussion of the *Aguilar—Spinelli* test is Dawson v. State, 14 Md. App. 18, 24, 284 A.2d 861, 864 (1971) (Moylan, J., concurring).

70. 378 U.S. at 109 (1964) (footnote omitted). On the basis of this affidavit, a search warrant had been issued. The ensuing search resulted in the seizure of heroin from Aguilar's house. Subsequently, Aguilar was convicted of possession of heroin and sentenced to 20 years imprisonment.

71. *Id.* at 114 (emphasis added) (footnote omitted).

72. 393 U.S. at 414.

residents of an apartment building in St. Louis. On one occasion he was seen entering a certain apartment. An FBI check revealed that the apartment contained two telephones, listed in someone else's name, with the numbers WYdown 4-0029 and WYdown 4-0136. Finally, the affidavit stated that "'William Spinelli is known to this affiant and to federal law enforcement agents and local enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.'"[73]

Justice Harlan, delivering the plurality opinion, reiterated the *Aguilar* requirements and held that the informant's tip, standing alone, was inadequate under *Aguilar* because no underlying circumstances had been shown. Next, the Court held that the affidavit's remaining information did not sufficiently corroborate the tip to enable it to pass the *Aguilar* test. The statement that Spinelli was a "known" gambler was dismissed as having no weight since it was a mere bald assertion.[74] The investigation of Spinelli had revealed only "innocent-seeming"[75] activity, and the information that the apartment had two telephones did not provide any basis for suspicion since "[m]any a householder indulges himself in this petty luxury."[76] Finally, the Court held that the information, taken as a whole, did not establish probable cause.

In discussing the inadequacy of the affidavit, the *Spinelli* Court delineated in a two pronged test the constitutional requirements. To pass the first prong of the test, the affidavit must indicate that the information was acquired in a reliable manner.[77] This element will be satisfied if the informant has seen the activity or been involved in it, has acquired his information from other reliable informants,[78] or has given a description of the criminal activity in such minute detail that it may be inferred that he acquired the information in a reliable manner.[79] Although the Court failed to discuss at length the second prong, it indicated that this aspect of the test is satisfied if the affiant states facts showing the informant's past credibility.[80]

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 416.
78. If the informant has acquired this information in this manner, the inquiry is focused on the reliability of his source's information and his source's honesty: "Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable." *Id.*
79. *Id.*
80. *See Id.* at 424 (White, J., concurring).

Although the *Aguilar-Spinelli* standards have been criticized as being too technical,[81] the basic premise underlying these cases is very simple: The magistrate, not the affiant, must make the decision.[82] The affiant's earnest assertion that probable cause exists is simply not enough. He must state the facts on which his conclusion is based—including facts concerning his informant's information and honesty—in order that the magistrate may draw his own conclusion. The *Nickens* court seemed to recognize an identical premise applicable to the sentencing situation: The judge, not the witness, must draw the conclusions.[83] Thus, when a witness gives hearsay testimony, he must recite the content of his informant's statements and the reasons why the informant should be believed.

SPINELLI AND SENTENCING

Section 298(f) states that hearsay evidence may be used in the sentencing of drug offenders "if the underlying circumstances upon which it is based and the reliability of the source of the information is demonstrated."[84] Since this language bears striking resemblance to the language contained in *Aguilar* and *Spinelli*, the appellant in *Nickens* had a strong argument that the statute demands the use of identical standards. Refusing to adopt the *Spinelli* standards *in toto*, the court indicated that the showing of credibility need not be as strong as required by *Spinelli*[85] and commented that "the consideration given to hearsay evidence must depend upon the extent of the reliability that is affirmatively established on the record."[86]

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81. *See id.* at 432-35 (Black, J., dissenting).

82. "[W]e cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry." Spinelli v. United States, 393 U.S. 410, 419 (1969).

The *Aguilar* Court said that its holding was required because "[o]therwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer . . . or, as in this case, by an unidentified informant." Aguilar v. Texas, 378 U.S. 108, 115 (1964).

83.

> The question of reliability is for the determination of the sentencing judge . . . . It may be that a police officer has sufficient training and experience to interpret the information or corroborate it with his own investigation, but the statements themselves, as related to the officer or witness, must be recited to the sentencing judge. It is the specific facts constituting the hearsay, not the witness's conclusion therefrom, that are admissible to establish informational reliability.

17 Md. App. at 290, 301 A.2d at 52.

84. MD. ANN. CODE art. 27, § 298(f) (1971).

85. See note 22 *supra*.

86. 17 Md. App. at 290, 301 A.2d at 53. The court's use of the term "reliability"

The court did not explain its reason for rejecting the strict application of the *Spinelli* rule. One possible reason is that the application of the concept of probable cause to the sentencing situation would be a doctrinal novelty. The term probable cause has traditionally been applied only in *ex parte* determinations of whether a person has been involved in criminal activity. Sentencing, on the other hand, is not an *ex parte* proceeding and the inquiry is not limited to allegations of criminal activity.

The answer to the doctrinal objections to the use of the *Spinelli* test in sentencing is that the test does not require a determination of probable cause at all. It is merely a tool to insure reliability when search warrant applications rest on hearsay information. Thus, although an affidavit may set forth underlying facts which enable the magistrate to draw his own conclusion, these facts may not be sufficient to establish probable cause. Applied to sentencing, the test could similarly be used to insure reliability. For example, corroborative facts offered in the instant case may have convinced the judge that Rhodes was involved in the criminal enterprise to a significant degree, but may not have convinced him that Rhodes was the number two man in the organization.

A second possible reason for the court's reluctance to embrace the strict *Spinelli* rule may have been based on the fear that such a result would unduly restrict the trial judge's inquiry concerning facts relevant to the determination of a proper sentence. The sentencing judge's job is not to determine whether each item of information has been proved to a particular degree of certainty; instead, he may receive information of varying degrees of reliability in order to develop a total picture of each defendant. The court

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renders this passage somewhat ambiguous. The passage occurs directly after the statement that the credibility showing need not be as great as in *Spinelli*. Therefore, the court might have meant, by the term "reliability," that the weight to be given will depend on the extent of the showing of *credibility*. However, if, by saying "reliability," the court meant to include both the informational basis for the witness's conclusions as well as the factual basis for crediting the informant's honesty, then the passage might be interpreted to mean that the judge may consider conclusory hearsay which is supported by only a scanty informational basis. However, even if the latter interpretation is given to this passage, the court surely could not have meant that the judge may accept the witness's conclusions as ultimate facts. Instead, because the court emphasized that the judge must draw his own conclusions, the passage probably means that, if the witness states facts which enable the judge to draw a lesser conclusion, he is free to do so. Thus, corroborative testimony in the instant case may have convinced the judge that, although Rhodes was not the number two man, he was, nevertheless, something more than a small-time dealer.

In addition, the court's use of the term "on the record" implies that the witness's corroborative statements must appear on the record in order that a reviewing court can determine if the test enunciated in *Nickens* has been satisfied.

might have believed that it was striking a proper balance between the need for protecting defendants from unfounded charges and the need for obtaining complete information.

The answer to this objection is that, if the witness cannot satisfy the showing of credibility needed for the issuance of a search warrant, the information should be given no weight in determining how long a person will be deprived of liberty. When search warrant applications rest on information from an informant, the magistrate cannot evaluate his credibility. For this reason, the Supreme Court has demanded at least a minimal demonstration of the informant's credibility before a search warrant can issue. That a search of a person's home is a monumental intrusion into personal liberty cannot be denied. But it is difficult to conceive of a greater intrusion into personal liberty than the imposition of a criminal sentence. It is therefore difficult to understand why an equivalent demonstration of credibility, at the very least, should not be required when information from an informant is used in determining whether, and for how long, a person will be imprisoned.

As a practical matter, however, there may be no difference between the application of the *Spinelli* and *Nickens* credibility requirements. Because *Spinelli* does not require a very strong demonstration of credibility,[87] it is likely that almost every demonstration inadequate under *Spinelli* would likewise be inadequate under *Nickens*.

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87. Dawson v. State, 14 Md. App. 18, 284 A.2d 861 (1971), illustrates that only a slight demonstration of credibility is necessary to satisfy the second prong of *Spinelli*. The pertinent parts of the affidavit challenged in *Dawson* read as follows:

> "Information from a . . . reliable informant *whose reliability has been established in the past by the arrest of two persons for narcotics and one for burglary* that one Patrick Dawson is dealing Dilaudid from his auto, a Black Ford approximately a 1963 model in the area of Ponca and Eastern Ave. in Baltimore City . . . .
>
> I [the affiant] have observed this Black 63 Ford in the area of Ponca and Eastern Ave. in Baltimore City on numerous occasions at approximately nine PM . . . . I have observed Patrick Dawson in another auto in the area of Ponca and Eastern Ave. on one occasion. . . . I further observed the Black Ford was listed in the name of Norma A. Dawson."

Id. at 20-21, 284 A.2d at 862-63. (emphasis added).

Dawson asserted that the credibility prong of *Spinelli* had not been satisfied. The court, however, ruled that "the combination of the recitation as to the informant's demonstrated reliability in the past and the independent,police verification of some of his story was sufficient" to satisfy this prong. *Id.* at 22, 284 A.2d at 863.

Judge Moylan, concurring, opined that it was "an extremely close question" whether the affidavit's recitation of the informant's past credibility was sufficient. *Id.* at 35, 284 A.2d at 870. However, he concluded that this information had been sufficiently corroborated to establish credibility: "The verification here was slight, but only slight verification was required." *Id.* at 41, 284 A.2d at 873.

CONCLUSION

Narrowly read, the *Nickens* case simply interpreted one section of a comprehensive drug statute. However, the language contained in *Nickens* and the relationship that *Nickens* bears to both federal and Maryland precedent suggest that this decision may represent an important step towards insuring an accurate factual basis for the sentencing decision.

Although it may be desirable to cloak sentencing judges with discretion to consider various kinds of information without being constrained by the strict rules of evidence, it is imperative that they reject information of doubtful reliability. Mere discretion is not enough; it is informed discretion that must be the backbone of a rational sentencing policy. Discretion cannot be informed if exercised on the basis of unreliable information. Therefore, *Nickens* should be interpreted broadly in order to insure that only reliable information is considered in the determination of sentence.